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No. _____

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS

Petitioners

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.

Respondents

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a § 1442(a)(1) removal case, may a federal court require the plaintiffs to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction, or should state standing law apply?

   a. Is satisfaction of Article III's standing requirements a jurisdictional necessity in a § 1442(a)(1) case?

   b. Does the law of the case doctrine allow the circuit court to adhere to its earlier decision, disregarding the undecided, preliminary, and "open" question posed by this Court in the interim?

2. Did the Fifth Circuit properly uphold the removal of this action by Tulane University, allegedly a "person acting under [a federal officer]," the National Institutes of Health ("NIH"), under 28 U.S.C. § 1442(a)(1)?

   a. Is the definition of "person" in § 1442(a)(1) restricted to natural persons or can it extend to an institutional defendant, as the Fifth Circuit ruled?

   b. As a matter of law, is it possible to "act under" an officer who lacks ultimate authority over the acts in question?

   c. Must the federal officer under whom the "person" acted be a natural person, or can "he" be an agency – or even a conglomerate of agencies – as the Fifth Circuit found?

LIST OF PARTIES

1. International Primate Protection League and Its Members – Petitioners
2. People for the Ethical Treatment of Animals and Its Members – Petitioners
3. Alex Pacheco – Petitioner
4. Louisiana in Support of Animals and Its Members – Petitioners
5. Administrators of Tulane Educational Fund – Respondent
6. National Institutes of Health – Respondent
7. Institutes for Behavior Resources, Inc. – Respondent

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Fifth Circuit, entered in the above-entitled proceeding on May 9, 1994.

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit in *International Primate Protection League v. Administrators of Tulane Educational Fund, et al.*, rendered on May 9, 1994, is set forth in the Appendix at A-1 through 4. Pursuant to Rule 47.5 of the Local Rules of the Fifth Circuit Court of Appeals, the court determined that its opinion should not be published.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1994 (A-1). The order denying a petition for rehearing and suggestion for rehearing *en banc* was entered on June 9, 1994 (A-13). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them . . .
>
> (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on

account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

Petitioners, organizations and individuals seeking the humane treatment of animals, brought this action to halt fraudulent experimentation on and the unnecessary killing of a group of macaque monkeys who have become popularly known as "the Silver Spring Monkeys." The animals are owned by the Institutes for Behavior Resources, Inc. ("IBR"), which subjected them to experimentation under a grant funded by the National Institutes of Health ("NIH"). A 1981 police raid on IBR's laboratory exposed cruelty to the animals that resulted in a criminal prosecution of the experimenter Dr. Taub, and the termination of NIH's grant to IBR. NIH took custody of the monkeys with the consent of IBR, which retained ownership. Amid mounting pressure for the monkeys' release to a sanctuary, in 1986 NIH secretly transferred them, with IBR's consent, to the Tulane Primate Research Center, which, in its own words, offered a "rural location" at "a private university . . . located in the conservative south, where the animal rights movement is not strong." In order to put an end to the controversy surrounding the monkeys, the biomedical community planned, with IBR's consent, to kill them under cover of a lethal experiment. Dr. Mishkin, an employee of the National Institute of Mental Health ("NIMH"), and a

colleague and ardent defender of the criminally-prosecuted Dr. Taub, designed the experiment at his home, over a weekend. When plans to implement the experiment were made public, some of the nation's foremost scientists decried it as a scientific fraud, but the experimenters were not deterred, as their principal objectives were political, not scientific.

Availing themselves of strong remedies provided by Louisiana law to protect against cruelty towards animals, in 1988 Petitioners filed suit in the Civil District Court for the Parish of Orleans, seeking injunctive relief and damages. Named as defendants were IBR, Tulane, and NIH. The state court immediately issued a temporary restraining order blocking the killing of the animals.

NIH removed the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and the federal district court continued the TRO in effect. An appeal was taken to the Fifth Circuit, which upheld NIH's removal and found, applying Article III standing guidelines, that Petitioners lacked standing; the case was ordered to be dismissed. 895 F.2d 1056 (5th Cir. 1990).

This Court granted a writ of certiorari, restricting its review to the question whether § 1442(a)(1) permits removal by federal agencies such as NIH. Concluding that it did not, the Court ordered the case remanded to state court. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 111 S.Ct. 1700 (1991). On remand, defendant Tulane filed a second removal petition, claiming to be a "person acting under" a federal officer within the meaning of § 1442(a)(1). On November 2, 1992, the district court

upheld the removal, concluding, on the strength of the defendants' submissions of fact, that Tulane was a "person acting under" the Director of NIH. Relying on the Fifth Circuit's earlier holding that Petitioners lacked Article III standing, the court entered summary judgment dismissing the case. (A-5, A-6 *ff.*).

Affirming the decision below, the Fifth Circuit upheld Tulane's removal, but recognizing the dearth of factual support for a conclusion that Tulane had acted under NIH's director, the court found that Tulane was a "person acting under" NIH, the agency. (A-2-3). The Fifth Circuit also affirmed the ruling that Petitioners could not satisfy Article III's requirements for standing. (A-4). Like the district court, it relied upon its 1990 holding on standing as the law of the case, thereby sidestepping the question expressly raised by this Court in its intervening decision: "whether a federal court in a § 1442(a)(1) removal case may require plaintiffs to meet Article III's standing requirements with respect to the state law claims over which the federal court exercises pendent jurisdiction." 500 U.S. at 78, n. 4, 111 S.Ct. at 1775, n. 4.

Petitioners return to this Court seeking an answer to this important open question, and challenging the propriety of Tulane's § 1442(a)(1) removal of the action.

REASONS FOR GRANTING THE WRIT

I. PETITIONERS WERE IMPROPERLY REQUIRED TO MEET ARTICLE III's STANDING REQUIREMENTS WITH RESPECT TO THEIR STATE LAW CLAIMS

A. The objectives of § 1442(a)(1) are disserved by the application of Article III standing requirements

The purpose of 28 U.S.C. § 1442(a)(1) is to provide a federal forum for the adjudication of federal defenses. *Willingham v. Morgan*, 395 U.S. 402, 409 (1968). A federal defense must be asserted, because it is the federal officer's substantive defense that 'arises under' federal law and provides the Article III basis for removal jurisdiction. *Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 968 (1989). In this case, the asserted federal defense is sovereign immunity. In the six year life of this litigation, however, the merits of the federal defense have never been reached by any court because Petitioners' claims have repeatedly been dismissed for want of Article III standing. From the outset, Petitioners have protested the impropriety of applying Article III standing requirements to their state-law claims, and the injustice of a dismissal by the federal courts without any adjudication of the alleged federal defense that provided the sole basis for federal jurisdiction.

This argument concerning the misapplication of Article III standing requirements to Petitioners' claims was completely disregarded by the federal courts until this Court declared in a footnote:

> Our grant of certiorari did not extend to the Court of Appeals' determination that Petitioners lack standing to protect the monkeys. We therefore leave open the question whether a federal court in a § 1442(a)(1) removal case may require Petitioners to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction. See *Mesa v. California*, 489 U.S. 121, 136 (1989) (basis for removal jurisdiction under § 1442(a)(1) is the federal officer's substantive defense that "arises under" federal law). See also *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) ("[I]nvocation of removal jurisdiction by a federal officer . . . is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties" (footnote omitted)); *Id.*, at 242, n. 17, 101 S.Ct. at 1665, n. 17 ("This principle of derivative jurisdiction is instructive where, as here, relevant state- court jurisdiction is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal").

500 U.S. at 78-79, n.4, 111 S.Ct. at 1705, n.4.

Defendants treated Petitioners' argument for the application of state standing guidelines as an effort to undermine the constitution. The district court agreed, stating that

> standing to sue in any Article III court is a federal question which does not depend on the party's prior standing in state court.

(A-9-10; citation omitted).

Petitioners pointed out that because this was already an Article III case by virtue of the federal defense, dispensing with Article III's standing requirements would have no jurisdictional consequence. Since *Tennessee v. Davis*, it has been recognized that the Article III basis for removal jurisdiction is the federal officer's substantive defense that 'arises under' federal law. *Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 959, 968 (1989). Thus in the present case, it is not Petitioners' claims but the assertion of federal defenses that establishes the Article III jurisdiction of the federal courts (if it exists). Once the nature of the Article III "case" is understood, the inapplicability of Article III standing requirements becomes abundantly apparent. The insistence that Petitioners satisfy the Article III requirements for a "case or controversy" overlooks the quite fundamental absence of any federal claim.[1] It makes no more sense to apply federal standing doctrine to Petitioners' state law claims than it would to require that they assert a federal claim, name the United States as a party, or establish diversity of citizenship in order to comply with the requirements of Article III. **Petitioners have not brought an Article III case; defendants have. Petitioners cannot logically be required to establish Article III standing to pursue what are not Article III claims.** In *Asarco Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct.

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[1] By contrast, in *Maine Assn. of Interdependent Neighborhoods v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051 (1st Cir. 1989), the case was removed to federal court under § 1441(b) (original jurisdiction removal), and constitutional standing requirements were applied. *IPPL* noted that the application was appropriate in *M.A.I.N.* because of the § 1441(b) jurisdictional base. 500 U.S. at 88, n. 9, 111 S.Ct. at 1710, n. 9.

2037 (1989), the Court found that the plaintiffs' lack of Article III standing in an action prosecuted in state court under a federal statute did not prevent the review, on a writ of certiorari filed by the defendants, of a federal question. That federal question, said the Court, presented a justiciable case or controversy, and the plaintiffs' lack of Article III standing did not alter that fact because the plaintiffs were "not the party attempting to invoke the federal judicial power." 490 U.S. at 618. The same principle applies here.

The imposition of Article III requirements on state-law claims would not only fail to satisfy any jurisdictional necessity, it would also fail to serve any other federal purpose. As noted above, the purpose of the removal statute is to provide a federal forum for the adjudication of federal defenses. *Willingham v. Morgan, supra.* That purpose would not be furthered by the application of federal standing law, a defense this Court has explicitly said the removal statute has no concern for protecting. *IPPL*, 500 U.S. at 86, n. 7, 111 S.Ct. at 1709, n.7.

Beyond the provision of a federal forum, the removal statute has no interest in displacing the rights of the states. *Tennessee v. Davis*, 100 U.S. at 271, early established that state substantive law would apply in removed actions, and the Court later emphasized that removal jurisdiction is "purely derivative . . . , neither enlarging or contracting the rights of the parties." *Mesa v. California*, 489 U.S. at 136, 109 S.Ct. at 968; *Arizona v. Manypenny*; 451 U.S. 232, 247, 101 S.Ct. 1657, 1664 (1981).

The application of Article III's more rigorous standing requirements, resulting in the dismissal of Petitioners'

claim, has not only severely contracted their rights but also has thwarted the enforcement of Louisiana's policies and laws on the humane treatment of animals – an area the federal government has specifically consigned to state regulation.[2] Louisiana law, which does not burden those asserting claims of animal cruelty with the requirements imposed by the courts below, was rewritten into oblivion by the removal of this case. As this Court has frequently observed, the constraints of Article III do not apply to state courts, see *Asarco Inc. v. Kadish, supra*; and Louisiana has fashioned a far more liberal standing policy than that obtaining in the federal courts. The supplanting of state standing law by federal law in the analysis of state law claims does violence to the objectives of § 1442(a), which was designed to provide a federal forum for a federal defense that has never been reached in this case.

This Court's citation of *Arizona v. Manypenny* in its "open question" footnote strongly suggested that Article III standing requirements should not be applied to Petitioners' state law claims. In *Manypenny*, a federal officer's assault prosecution was removed to federal court under § 1442(a). The officer was acquitted and the state sought to appeal, a right under Arizona law that was not accorded by federal law. In determining whether to allow the appeal, the Court reviewed the historical purpose of § 1442 to ensure a federal forum for a federal officer's

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[2] In enacting the Animal Welfare Act, 7 U.S.C. § 2116 *et seq.*, Congress acknowledged that it was taking only "a very small first step toward the elimination of cruelty, mistreatment, and abuse of laboratory animals," 112 Cong. Rec. 19, 785 (1966) and invited the states to fill the gap. 7 U.S.C. § 2143(a)(8).

federal defenses. Federal jurisdiction under § 1442 is derivative, the Court found, and a state proceeding does not "arise under federal law" in the sense that it preempts state law. Rather, federal procedural law is applied without "revis[ing] or alter[ing] the underlying [state] law to be applied." *Id.* at 241-242. "This principle of derivative jurisdiction is instructive" said the Court, "where, as here, relevant state-court jurisdiction [over the appeal] is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal." *Id.* at 242 n.17. Because the policies supporting removal were fully vindicated by the provision of a federal forum, there was no need for further interference in state law by restricting rights the parties would have enjoyed under state law. Accordingly, the Court upheld the state's right of appeal.

To cite the "instructive . . . principle of derivative jurisdiction" from *Manypenny* on the analogous question of the applicable standing requirements after removal was perhaps to provide the answer. *See IPPL*, 111 S.Ct. at 1705 n.4. Just as in *Manypenny*, it may be said here that "relevant state-court jurisdiction is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal." Because federal jurisdiction here is derivative, does not arise under state law in the sense that it preempts state law, and is not meant to enlarge or contract the rights of the parties, it cannot apply to deprive the Petitioners of a forum for their claims under Art. III standing requirements, with whose protection the removal statute "is not concerned."

For this reason, Wright, *et al.* have opined that where questions of state law are presented to federal courts,

state standing law applies. 13A *Federal Practice and Procedure: Jurisdiction 2d* § 3531.14 at 84. *See also, Ferency v. Austin*, 493 F. Supp. 683,690 (W.D. Mich. 1980).

If Tulane is entitled to remove at all, which is doubtful, the objective of § 1442(a)(1) will have been fully realized by the provision of a federal forum for the alleged federal defenses. Further application of Article III standing requirements would enforce federal interests not entitled to protection, in violation of the derivative nature of removal jurisdiction under § 1442(a)(1) and in improper abrogation of state policies at work here. Because § 1442(a)(1) is not designed to enlarge or contract the rights of the parties, the application of federal standing requirements, resulting in a dismissal of Petitioners' claims without any adjudication of defendants' federal defenses, was a perversion of the statute's intent and an improper exercise of federal jurisdiction in derogation of Louisiana law.

B. The law of the case rule was inapplicable here

The "open question" posed by this Court has not been answered. The district court bypassed it, ruling that it "[could] not ignore the fact that the Fifth Circuit has already decided in this very case . . . that these Petitioners do not meet the constitutional requirements for standing . . . " (A-10). Tearing a page from the same book, the Fifth Circuit ruled that it was "bound by [its] previous holding under the 'law of the case' doctrine." (A-4). Accordingly, the court found that Petitioners lack standing and that their suit was properly dismissed. *Id.*

The application of the law of the case doctrine was improper for several reasons. First, the Fifth Circuit's earlier decision was reversed by this Court, and therefore should not have been given precedential value. It is beyond cavil that "to vacate a judgment is to take away from it any precedential affect [sic]," so that it cannot operate as the law of the case. *Falcon v. General Telephone Co.*, 815 F.2d 317, 320 (5th Cir. 1987). *See also, Johnson v. Bd. of Education of Chicago*, 457 U.S. 52, 102 S.Ct. 2223, 2224 (1982). The court declared, however, that this Court, having reversed the ruling on federal jurisdiction, "left intact our ruling on standing." (A-4). This conclusion is subject to question. This Court did not simply reverse the jurisdictional holding, but reversed "the *decision* of the Court of Appeals" with instructions that the case was to be remanded to state court, 111 S.Ct. at 1710, where, the Court had previously noted, state standing requirements would plainly apply. 111 S.Ct. at 1705, n.4, 1709, n.7. There was no reason for this Court to address the Fifth Circuit's holding on standing, because the remand to state court obviated the need for any consideration of Petitioners' standing under Article III. The distinction between reversal and vacation of a judgment in this context is difficult to discern. See *U. S. v. Simmons*, 923 F.2d 934, 956 (2d Cir.) *cert. denied*, ___ U.S. ___, 111 S.Ct. 2018 (1991) (Supreme Court reversal prevented application of law of the case doctrine). And the finding that this Court "left intact" a ruling it held the Fifth Circuit had no jurisdiction to enter[3] seems particularly dubious.

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[3] This Court's holding that NIH's removal was statutorily unauthorized necessarily stripped the federal courts of jurisdic-

Additionally, this Court's decision – even if it could be said to have left the standing ruling technically "intact" – cannot in any way be seen as an endorsement of that ruling. To the contrary, this Court specifically called into "open question" the matter of whether the Article III analysis employed by the Fifth Circuit was applicable. 111 S.Ct. 1705, n.4. Thus, adherence to the previous holding on standing as the law of the case violated one of the most fundamental precepts of that doctrine: *the law of the case comes into play only with respect to issues previously determined. Quern v. Jordan*, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148, n. 18 (1979); *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983); *Key v. Wise*, 629 F.2d 1049, 1054-1055 (5th Cir. 1980); *Pickens v. Okolona Municipal Separate School District*, 594 F.2d 433, 436 (1979). See also *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1195, 1196 (5th Cir. 1989).

The only standing issue previously determined by the Fifth Circuit was that Petitioners failed to meet Article III standing requirements. Even assuming that that ruling had precedential value, it would not come into operation unless and until the threshold question of the applicability of Article III requirements had been decided affirmatively. If it were decided that Article III standing analysis would *not* apply, the prior decision on standing would have no bearing whatsoever on the determination of Petitioners' standing under state law.

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tion. That meant that the Fifth Circuit lacked subject matter jurisdiction when it determined that Petitioners lacked Article III standing, and that determination should not achieve "law of the case" status.

The intervening decision of this Court amounted to a "controlling authority [which] has since made a contrary decision of law applicable to the issue." See *Falcon, supra* at 320. In such cases, the law of the case cannot be followed. *Id.*

Petitioners do not mean to suggest that a writ of certiorari should be granted to review the Fifth Circuit's misapplication of the law of the case doctrine; rather, that the law of the case doctrine does not bar consideration and decision of the open question whether Petitioners must satisfy Article III standing requirements.

II. THE FIFTH CIRCUIT'S RULING THAT TULANE'S REMOVAL OF THIS ACTION WAS PROPER EXPANDS THE DEFINITION OF 28 U.S.C. § 1442(a)(1) IN A MANNER THAT CONFLICTS WITH THE STATUTE'S INTERPRETATION BY THIS COURT AND BY LOWER COURTS IN OTHER CIRCUITS

A. Only natural persons should be entitled to remove under § 1442(a)(1)

The statute on which Tulane predicated its removal, entitled "Federal Officers Sued Or Prosecuted," provides in pertinent part:

> (a) A civil action . . . commenced in a state court against any of the following persons may be removed by them . . .
>
> (1) any officer of the United States or any agency thereof, or person acting under him . . .

28 U.S.C. § 1442.

After this Court held that defendant NIH was not entitled to remove, defendant Tulane, asserting that it was a "person acting under [an officer of the United States]," filed its removal petition. Tulane had forewarned this Court of its intention to take such action and sought advance approval of it. However, the Court declared:

> whether Tulane will be able to remove the remanded case requires a determination whether it is a "person acting under" the Director of NIH within the meaning of § 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record.

500 U.S. at 89, 111 S.Ct. at 1710.

The issue is now ripe for review. At the outset, the question arises whether a non-natural person such as Tulane falls within the meaning of "person" under § 1442(a). Lower courts have reached differing results on this question.

In *IPPL*, this Court determined that NIH could not be viewed as a "person" acting under its directing officer. This conclusion turned on the awkwardness of NIH's interpretation and on the finding that the term "person" seldom included the sovereign. 500 U.S. at 82, 111 S.Ct. at 1707. The Court did not address the question whether "person" could include non-natural persons.

While the Dictionary Act does not confine the meaning of "person" to natural persons, *See*, 1 U.S.C. § 1, ("In determining the meaning of any act of Congress, unless

the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, . . . "), the scope of the term depends upon its context: "[t]he word 'person' . . . is not a term of art with a fixed meaning wherever it is used." *Pfizer Inc. v. India*, 434 U.S. 308, 315 (1978).

As this Court observed in *IPPL*, "for more than 100 years prior to 1948, Congress expressly limited whatever removal power it conferred upon federal defendants to individual officers." 500 U.S. at 85, 111 S.Ct. at 1708. The long line of caselaw discussing the history and purpose of the statute make it clear that Congress intended to protect individuals from the local prejudice and harassment to which individuals are peculiarly subject. See *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959 (1989); *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813. The "person acting under him" language first appeared in the current statute, Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 938. The forerunners of § 1442(a)(1) also authorized removal by "persons" assisting a federal officer; however, the distinguishing characteristic of those prior enactments was their restriction of the "person's" activities to the enforcement of specific laws.[4] *See e.g.*, Act of Feb. 4, 1815, Ch. 31, § 8, 3 Stat. 198 (officers enforcing the customs act, " . . . or any other person aiding or assisting, agreeable to the provisions of this act or under colour thereof, for any thing done, or omitted to be done, as an officer of the

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[4] Counsel found no evidence of the application of any of these statutes to non-natural persons, whereas the "acting under" clause of § 1442(a) has been invoked by corporations and associations. See discussion below.

customs . . . "); Act of March 2, 1833, Ch. 57, § 3, 4 Stat. 633 ("any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, . . . or for on account of any right, authority, or title set up or claimed by such officer, or other person under any such law of the United States . . . "); Act of Feb. 28, 1871, Ch. 99, § 16, 16 Stat. 438-439 ("any officer of the United States or other person, for or on account of any act done under the provisions of [the Elective Franchise Act]"); Act of 1911, Ch. 231, § 33, 36 Stat. 1097 ("any officer . . . acting by authority of any revenue law . . . , or . . . any person acting under or by authority of any such officer . . . "); Act of 1919, Ch. 85, § 28, 41 Stat. 316 ("The commissioner [under the National Prohibition Act], his assistants, agents, inspectors . . . ").

The present text of the statute was adopted during the 1948 Judicial Code revision, which expanded it to include all federal officers and persons acting under them. The only legislative history on the revision is offered by the House Committee Report:

> The revised subsection . . . is extended to apply to all officers and employees of the United States or any agency thereof. [The predecessor provision] was limited to revenue officers . . .

H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947). See, *IPPL*, 500 U.S. at 84, 111 S.Ct. at 1708.

The comment's reference to a "person acting under" as an "employee" is more consistent with an individual working directly for the government than a corporation acting pursuant to a contractual arrangement. Moreover, had Congress intended to expand the removal power not

only from certain classes of federal officers to all federal officers but also from individuals to all persons – natural or non – contracting with the government, one would expect further comment on so sweeping a change.

Several cases have considered whether § 1442(a)(1) embraces non-natural persons. Two of the most thoughtful analyses, in *Ryan v. Dow Chemical*, 781 F. Supp. 934 (E.D.N.Y. 1992) (certified for appeal), and *Krangel v. Crown*, 791 F. Supp. 1436 (S.D. Ca.), *appeal denied*, 968 F.2d 914 (9th Cir. 1992), reach different results. *Ryan* found the "arid interpretive landscape" unilluminating, and concluded that a corporation, which might be in a position to invoke a federal defense, could remove. 781 F. Supp. at 946. *See also, Pack v. AC&S, Inc.*, 838 F. Supp. 1099 (D.Md. 1993); *Fung v. Avex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965 (D. Ariz. 1992). *Krangel*, on the other hand, held that

> the presumption that Congress' definition of the word "person" includes corporations is outweighed in light of the purpose of the statute, the fact that ambiguities should be resolved against federal jurisdiction, and the strong interest of the states in adjudicating the rights and obligations of their citizens.

791 F. Supp. at 1446. *See also, Mignona v. Sair Aviation*, 937 F.2d 37, 41 (2d Cir. 1991) (disallowing removal by a nonappropriated fund instrumentality).

The court in *Bakalis v. Crossland Savings Bank*, 781 F. Supp. 140, 145-146 (E.D.N.Y. 1991), struck a middle ground between *Ryan* and *Krangel*, disallowing the attempted removal by a bank operating under federal

guidelines and holding that when the removing defendant is a corporation "a closer nexus between government and the person seeking removal . . . [is] required."

The Fifth Circuit, without analysis, concluded that Tulane was a "person". *See* A-2. Although its holding does not, strictly speaking, present a conflict among the circuits, the non-appealability of most decisions ordering remand means that the conflict presented here is unlikely to be carried into the circuit courts. *See*, 28 U.S.C. § 1447(d); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976).

The potential expansion of federal jurisdiction to embrace a broad class of federal contractors, and the confusion in the lower courts on this issue suggest that this important question of federal law should be settled by this Court.

B. As a matter of law, a person cannot "act under" a federal officer who lacks ultimate control

The "acting under" requirement of § 1442(a)(1) has generally presented thornier issues of fact than of law. In a fairly comprehensive analysis, the court in *Ryan v. Dow*, *supra*, placed removing defendants along a spectrum between – at one end – those acting under the general auspices of a federal officer or within a federally regulated industry (not entitled to remove) and – at the other end – those acting pursuant to an officer's direct orders or to comprehensive and detailed regulations (entitled to remove); between those poles, said the court, are "numerous close calls." 781 F. Supp. at 947. As noted above, the *Bakalis* court required a "closer nexus" to the

government when the removing defendant is a corporation, 781 F. Supp. at 145, 146. *See also, Krangel v. Crown, supra.*

In finding that the requisite governmental control was exercised here, the Fifth Circuit looked to a 1986 letter agreement signed when NIH transferred the monkeys to Tulane's Primate Center, stating that Tulane was "acting strictly as an aide to NIH in its role as custodian." According to the agreement, Tulane could not make more than routine decisions without obtaining NIH's permission. The court further found (wrongly – see discussion below) that "NIH officials participated in and directed the euthanasia of the monkeys." These facts, the court concluded, adequately supported the district court's "acting under" determination. (A-3).

By this analysis, the Fifth Circuit, like the district court before it, avoided the more difficult legal question: is it possible to "act under" a federal official (assuming for a moment that there is one) who himself lacks control over the actions at issue? The factual question decided by the courts below – that Tulane could not act without NIH's permission – was virtually undisputed. Petitioners' objection to the invocation of § 1442(a)(1) stemmed not from the interrelationship between Tulane and NIH, but from the interrelationship between NIH and IBR, the private company which owns the monkeys and which has iron-fistedly retained authority over them. IBR issued repeated reminders to NIH that it could not take significant actions with regard to the monkeys without IBR's consent. For example, in 1986, IBR issued a written reminder to NIH that "[i]n legal parlance, NIH holds the

primates as a 'bailee' – it has no ownership rights to them." On a later occasion, IBR warned:

> If you authorize or participate in the violation of our property rights by transferring the primates to any person or institution without our approval, we shall hold you personally responsible.

NIH repeatedly acknowledged its "absence of authority to act independently of the owner of the monkeys [IBR]." Indeed, when over 300 members of Congress petitioned NIH to release the animals, NIH plainly stated that it "d[id] not have authority to act independently of the monkeys [sic] owner." On the matters at issue in this case – the life, death, location, and experimental issues – Tulane reported to NIH, which reported to IBR, which alone had the authority to decide the course of action to be taken.

Both the district court and the Fifth Circuit clearly considered the matter of IBR's involvement irrelevant. In both courts, the removal inquiry stopped abruptly with the determination that Tulane acted under NIH. The hundreds of pages of documentary and testimonial evidence addressing the fact that NIH acted under IBR were never discussed.

Because NIH's role in this case has essentially been that of an intermediary, the Fifth Circuit, in looking principally to the letter agreement which says Tulane is NIH's aide, may have allowed the parties to confer federal jurisdiction on Tulane by a document that was more form

than substance.[5] Evidence that Tulane acted under a federal official who had no authority hardly established the federal interest at the heart of a § 1442(a) removal.

Removal under § 1442(a)(1) has always been perceived as an extraordinary remedy, necessary to protect the federal government from state-sanctioned interference. *See, Mesa v. California*, 489 U.S. 121, 126, 109 S.Ct. 959, 963 (1989); *Willingham v. Morgan*, 395 U.S. 402, 406, 89 S.Ct. 1813, 1815 (1969); *Tennessee v. Davis*, 100 U.S. 257, 263 (1880). *Willingham* determined that the validity of the claim that an officer was acting "under color of" office need not be established in order to justify removal – or, in the words of the Court, the officer "need not win his case before he can have it reviewed." 395 U.S. at 407.[6] Where a suit is brought directly against the federal officer, *Willingham's* broad interpretation of the "under color of . . . office" clause, requiring mere assertion of

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[5] Litigants may not confer subject matter jurisdiction by agreement. See *Insurance Corp. of Ire. v. Compagnie des Bauxites*, 456 U.S. 694, 702, 102 S.Ct. 2099 (1982); *California v. LaRue*, 409 U.S. 109, 113 n.3, 93 S.Ct. 390, 394 n.3 (1972).

[6] In *Willingham*, a prisoner tort suit against a federal warden, the Court examined the removal statute's requirement that an officer be sued for an act "under color of . . . office", in light of the prisoner's claim that the warden had been engaged in a "frolic of [his] own." The fact of the alleged "frolic", said the prisoner, defeated removal. The Court disagreed, finding the "under color of" test satisfied by the warden's allegation that his only contact with the prisoner had been in the performance of his official duties. The question of a "frolic", the Court ruled, went to the defenses of official justification and immunity – the very defenses for which the removal statute intended to provide a federal forum. Here, the "acting under" requirement raises a threshhold question of federal interest before the sovereign immunity issue is reached.

a federal defense, clearly effectuates the statutory purpose of protecting the federal government by providing a federal forum for federal defenses. But where, as here, the link to the federal government is more attenuated because removal is sought by a person allegedly acting under an officer, the mere assertion of an immunity defense creates less certainty of the need for the protection of a federal forum.[7] Tulane's removal, premised upon the mere participation, rather than the control of the federal government, has raised the possibility that litigation concerning any activity touched by federal funding or other peripheral federal involvement may be litigated in federal court, regardless of the absence of ultimate government control. Such a result would enlarge the scope of § 1442(a)(1) exponentially and would offer the protection of the federal courts to a broad array of cases in

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[7] Petitioners' showing that NIH had no real authority over Tulane's actions has obvious bearing on the sovereign immunity defense. Indeed, as this Court observed in *IPPL*, the official immunity defense generally hinges on "the crucial question- . . . whether the relief sought in a suit nominally addressed to the officer [was] relief against the sovereign." 500 U.S. at 85, 111 S.Ct. at 1708 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 1460 (1949)). Certainly, the courts below, which gave only the most glancing attention to Petitioners' claims that Tulane was not genuinely acting under a federal officer, apparently considered such an in-depth analysis beyond the scope of their threshold decision on the propriety of removal. One of the most frustrating aspects of this litigation has been that the courts have never addressed the sovereign immunity defense that was theoretically the basis for the exercise of federal jurisdiction here. Dismissed without a hearing, Petitioners have never had the opportunity to show that the "operations of the general government" were not imperilled by their suit.

which the workings of the federal government are clearly not placed in jeopardy.

If Congress had intended to authorize removal of any suit in which a sovereign immunity defense were raised, it could have expressed that intention far more simply than by the protracted language of § 1442(a)(1). The restriction of removal power to an "officer of the United States . . . , or person acting under him, for any act under color of such office . . . " suggests a narrower meaning than "any person asserting a federal defense." As *Willingham* observed, the narrowing of the statute cannot practically come from a pre-screening of the sovereign immunity defense. The statute can, however, be properly curtailed by a restrictive reading of the "acting under" requirement, which would insure a pronounced enough federal interest to warrant the incursion upon the jurisdiction of state courts. In this case, the lower courts' failure to inquire deeply into the "acting under" requirement, combined with their failure to reach the sovereign immunity defense, resulted in the dismissal of Petitioners' state claims to no federal purpose – and on the strength of a standing defense which § 1442(a)(1) "is not concerned with . . . protect[ing]." *See, IPPL*, 500 U.S. at 86 n.7, 111 S.Ct. at 1709 n.7. The rights of Petitioners and the laws of the State of Louisiana were displaced in protection of the private actions of private entities.

The marginal federal interest in this case did not warrant removal, and Petitioners submit that Congress did not authorize removal: a person cannot "act under" a federal officer who lacks control over the project in question.

C. § 1442(a)(1) requires that one "acting under" an officer acts under an individual

The Fifth Circuit moved quickly from a statement that Tulane's removal must be supported by a showing that it acted under a federal *officer* (A-2) to a finding that Tulane had acted under a federal *agency* (A-3).

In interpreting § 1442(a)(1) as authorizing removal only by an individual officer, and not by an agency, this Court implied that a "person acting under him" would likewise have to be acting under an individual officer. Indeed, the Court specifically cited the use of the term "him" as support for its conclusion that the "officer" later described as "him" was an individual, not an agency. *IPPL*, 500 U.S. at 80, 111 S.Ct. at 1706. It further stated, in declining to review Tulane's right of removal, that the issue "requires a determination whether it is a "person acting, under *the Director of NIH . . . '*," again suggesting the need for an individual officer. 500 U.S. at 89, 111 S.Ct. at 1710 (emphasis supplied).

Consistent with this holding, Tulane identified NIH's Dr. Raub as the officer under whom it had acted. When called upon to prove that Tulane had acted under a federal officer, however, defendants did not confine themselves to Dr. Raub's allegedly supervisory activities but listed every element of participation by any federal employee. The scramble to build a record of federal involvement was necessitated by the fact that IBR, rather than the federal government, was in charge, as discussed above, so that Tulane's prospects of establishing that it had "acted under" a federal officer were questionable at

best. Faced with the daunting task of satisfying the "acting under" requirement, defendants yielded their pretense of having a supervisory federal officer to their concern for demonstrating a stronger federal presence. To this end, Tulane pointed to the roles of Dr. Mishkin in the design of the fatal experiments on the monkeys, and of Dr. Pons, Mishkin's subordinate, in the conduct of the experiments. Petitioners discovered that Dr. Mishkin, a colleague of the criminally-prosecuted IBR experimenter, Dr. Taub, had designed the experiment with others at his home, over a weekend, for the express purpose of avoiding reliance on federal funds. Equally significant was the undisputed fact that Drs. Pons and Mishkin were employees of the National Institute for Mental Health ("NIMH"), now a branch of NIH but then a separate agency; their work on the monkeys was reviewed by neither their NIMH supervisor nor by NIH's Dr. Raub. Making an error of fact neither urged by defendants nor committed by the trial court, the Fifth Circuit simply redesignated Drs. Pons and Mishkin as "NIH officials," who were said to have "participated in and directed the euthanasia of the monkeys." (A-3).

By this holding, the Fifth Circuit reached the anomalous result that although an agency does not qualify as a federal officer under the first clause of § 1442(a)(1), the second clause, referring to a "person acting under *him*," not only encompasses an agency, but more amorphously, the whole of the federal government. Such a broadening of the statute conflicts with the holding of this Court in *IPPL*.

CONCLUSION

The application of federal standing requirements to Petitioners' state law claims in this removed action resulted in the dismissal of the suit and the frustration of state policies, despite the questionable presence of any federal interest and without any consideration whatsoever of the federal defense that theoretically warranted removal in the first place. This result conflicts with this Court's prior pronouncements that § 1442(a)(1) is not meant to contract the rights of the parties, and with this Court's specific question, unanswered below, whether Article III standing guidelines can properly be applied to state-law claims over which the federal court exercises pendent jurisdiction.

This Court has never examined the scope of 28 U.S.C. § 1442(a)(1)'s authorization of removal by a "person acting under" a federal officer. This case presents unresolved questions as to who constitutes a "person", what is meant by "acting under", and who or what qualifies as a federal officer. To the extent these issues have been addressed by the lower courts, disagreements have arisen; and the interpretation rendered by the Fifth Circuit in this case is the most expansive yet, allowing a substantial broadening of federal jurisdiction.

These issues warrant this Court's review.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3067

INTERNATIONAL PRIMATE PROTECTION LEAGUE, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS and LOUISIANA IN SUPPORT OF ANIMALS,

Plaintiffs-Appellants,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONS FUND, NATIONAL INSTITUTES OF HEALTH and INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-91-2966 "L" (2))

(Filed May 9, 1994)

Before REAVLEY and JOLLY, Circuit Judges, and PARKER*, District Judge.

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* Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:**

The facts of this case are adequately set forth in *International Primate Protection League v. Administrators of the Tulane Educ. Fund*, 895 F.2d 1056, 1057-58 (5th Cir. 1990). The Supreme Court reversed our judgment and remanded the case to state court. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700 (1991). Tulane then removed the case to federal court under 28 U.S.C. § 1442(a)(1). The district court determined that removal was proper and dismissed the suit for lack of standing. The International Primate Protection League appeals. We affirm.

I. Removal under § 1442(a)(1)

For Tulane to remove under § 1442(a)(1), it must be (1) a person (2) acting under a federal officer (3) for an act under color of such office. 28 U.S.C. § 1442(a)(1). Tulane, as a corporate entity, is "a person" within the meaning of § 1442 (a)(1). *See Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 946-47 (E.D.N.Y. 1992); *see e.g., Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 58 (5th Cir.), *cert. denied*, 422 U.S. 1043 (1975); *Texas v. National Bank of Commerce of San Antonio*, 290 F.2d 229, 231 (5th Cir.), *cert. denied*, 368 U.S. 832 (1961).

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Next, we must determine whether Tulane was "acting under" a federal officer. While we review the propriety of the removal *de novo*, we review the court's findings of fact relating to the jurisdictional issue for clear error. *See MDPhysicians & Assc. [sic], Inc. v. State Board of Ins.*, 957 F.2d 178, 180-81 & n.2 (5th Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Williamson v. Tucker*, 645 F.2d 404, 412-17 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). "Acting under" as used in § 1442 (a)(1) means the federal officer directs or exercises substantial control over the party's actions. *See Camacho v. Authoridad de Telefonos de Pureto [sic] Rico*, 868 F.2d 482, 486 (1st Cir. 1989); *Ryan*, 781 F. Supp. at 947-50; *Noble v. Employers Ins. of Wausau*, 555 F.2d 1257, 1258-59 (5th Cir. 1977); *see e.g., Peterson*, 508 F.2d at 57; *Bank of Commerce*, 290 F.2d at 231.

The National Institute of Health (NIH) and Tulane entered into a letter agreement that specifically sets forth Tulane's duties as an "aide to NIH," and it states that Tulane must obtain NIH's permission before performing any activity other than the custodial care of the monkeys. Further, NIH officials participated in and directed the euthanasia of the monkeys; Tulane provided the facilities and support staff. Based upon the letter agreement and NIH's participation in the euthanasia of the monkeys, we cannot say that the court clearly erred. *See Bank of Commerce*, 290 F.2d at 231 (holding that detailed letter agreement showed that bank was "acting under" a federal officer). Removal was proper under §1442(a)(1).

II. Standing

Appellants argue that because they have standing under state law, they should be accorded standing to pursue their claim in federal court. In the previous appeal, the Supreme Court noted that this was an open question, which was not before the Court. *Primate Protection,* 111 S. Ct. at 1074-75 n.4. The Supreme Court reversed our judgment on a federal *agency's* right to remove under § 1442(a)(1), but left intact our ruling on standing. We are, therefore, bound by our previous holding under the "law of the case" doctrine. *See Falcon v. General Tel. Co.,* 815 F.2d 317, 319-20 (5th Cir. 1987) ("[I]t would not do well for the morale or credibility of the judiciary to have one panel of Circuit Judges second-guessing another panel from the same circuit on the same question of law in the same case."). Appellants lack standing and the district court properly dismissed the suit.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	**CIVIL ACTION**
	NO. 91-2966
	SECTION: L(2)
VERSUS	
ADMIN. OF THE TULANE EDUCATIONAL FUND	

JUDGMENT

(Filed Nov. 3, 1992)

The defendants' motion for summary judgment having been granted dismissing the plaintiffs' case; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants and against the plaintiffs dismissing plaintiffs' suit with costs.

New Orleans, Louisiana, this 3rd day of November, 1992.

/s/ Veronica D. Wicker
VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
WICKER, J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE ET AL	CIVIL ACTION
VERSUS	NO. # 91-2966
ADMIN. OF THE TULANE EDUC. FUND	SECTION "L" (2)
	(Filed Nov. 2, 1992)

The Fifth Circuit has directed this Court to decide whether the Administrators of the Tulane Educational Fund ["Tulane"] satisfied the two requirements of removal under 28 USC §1442(a)(1). *In re Administrators of Tulane Educational Fund*, 954 F. 2d 266, 270 (5th Cir. 1992). Thereafter the defendants filed a Motion for Summary Judgment on the grounds of standing, sovereign immunity, the supremacy doctrine, and the absence of valid causes of action under Louisiana's animal cruelty and tort laws.

After considering the briefs of counsel, the record, and the applicable law, this Court finds that removal by Tulane was proper under 28 USC §1441(a)(1) and that the defendants' motion for summary judgment has merit.

The history of this lawsuit is ably set forth in the two earlier Fifth Circuit decisions. *In re Administrators, supra* and *International Primate Protection League v. Administrators of Tulane Educational Fund*, 895 F. 2d 1056 (5th Cir. 1990).

The removal statute at issue, 28 USC §1442(a)(1), provides in pertinent part:

> A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . .

In connection with the issue of Tulane's removal, the court reviewed Tulane's petition for removal, along with the allegations in plaintiff's complaint; the various Declarations of William F. Raub, Phd., ["Raub"] Acting Director of the National Institutes of Health ["NIH"] setting forth the terms of a 1986 agreement with Tulane for care of the monkeys and NIH's custodial, financial and research interest in the monkeys; an affidavit of Peter Gerone, Director of Tulane's Delta Regional Primate Research Center; the June 23, 1986, letter from Raub to John J. Walsh, Chancellor of the Tulane School of Medicine, confirming the agreement for care of the primates; and those portions of Dr. Raub's deposition concerning the 1986 agreement for care of the monkeys at the Delta Primate Center (Raub deposition at pp. 360-367.)

On that basis, the Court finds sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of §1441(a)(1), namely that, at all material times, Tulane was and is a "person acting under" the Director of the NIH, an officer of the United States, and that its acts are "under color of such office." Accordingly,

Tulane's removal under §1441(a)(1) was proper and this Court has jurisdiction over this case and controversy.

Of the several grounds that defendants advanced in their motion for summary judgment, the Court finds the issue of the plaintiffs' lack of standing dispositive.

In *International Primate Protection League v. Administrators of Tulane Educational Fund,* 895 F. 2d 1056 (5th Cir. 1990), the Fifth Circuit found that the plaintiffs lacked Article III standing either to assert an interest to enjoin Tulane from experimenting on or euthanizing the surviving monkeys, or to seek custody of the monkeys. Specifically, the court found that plaintiffs failed to allege an injury sufficient to meet the second prong of the Article III standing requirements.[1] The U. S. Supreme Court reversed *International Primate Protection League, supra,* only on the issue of whether NIH's removal of this matter from state court was proper under 28 USC §1442(a)(1). *International Primate Protection League v. Administrators of Tulane Educational Fund,,* ___ U.S. ___, 111 S. Ct. 1700 (1991). It specifically pointed out at 111 S. Ct. 1705, footnote 4, that its grant of certiorari did not extend to the

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[1] The Fifth Circuit explained that the plaintiff must demonstrate two things to meet the standing requirements under Article III.

> First "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[;]," . . . and second, a causal connection between the injury and the conduct such that the injury is "likely to be redressed by a favorable decision." (Citations omitted.) *International Primate Protection League v. Administrators of Tulane Educational Fund,* 895 F. 2d 1056, 1058 (5th Cir. 1990).

Fifth Circuit's decision that petitioners lacked standing to protect the monkeys.

In bringing this motion to dismiss, the defendants contend that the Fifth Circuit decision on the plaintiffs' lack of standing to sue applies through the doctrine of collateral estoppel. See generally *Greenhouse Patio Apartments v. Aetna Life Ins. Co.*, 868 F. 2d 153 (5th Cir. 1989); *Witherspoon v. United States*, 838 F. 2d 803 (5th Cir. 1988); *Estevez v. Nabers*, 219 F. 2d 321 (5th Cir. 1955). In *Estevez, supra*, the first judgment was dismissed for lack of jurisdiction and the Fifth Circuit commented:

> Even if regarded as a decision not on the merits, the first action precludes a new adjudication of the question actually decided although it does not "bar the cause of action." . . . The Restatement calls this effect of a non-merits judgment 'direct estoppel.' Restatement Judgments Sec. 49, Comment b. This terminological distinction seems valuable to show that such a judgment does not bar the cause of action. But whether the first decision was on the merits or not is not important here, since we regard the two actions as not materially different, and the question actually decided in the first action disposes of the present one as well. *Id.*

In opposing this motion, the plaintiffs argue that they have standing under Louisiana state law, that the Fifth Circuit decision on Article III standing has been vacated and is not binding on this Court, and that there is no federal interest presented in this controversy so the case should again be remanded.

"Standing to sue in any Article III court is . . . a federal question which does not depend on the party's

prior standing in state court. (Citations omitted.)" *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 804, 105 S. Ct. 2965, 2970 (1985).

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ". . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (Citations omitted.) *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2139 (1992)

Although there may no longer be an extant Fifth Circuit decision on standing in this case, the Court cannot ignore the fact that the Fifth Circuit has already decided in this very case that there was a federal interest presented and that these plaintiffs do not meet the constitutional requirements for standing to act as advocates for the monkeys' interest. The depositions and exhibits amassed since the appellate decisions flesh out the details of this controversy but do not alter the conclusion that these privately owned monkeys have been in federal custody for over ten years and that the NIH and its officers have a continuing custodial, financial and research interest in these monkeys. Likewise, the facts presented by the plaintiffs as to standing have not changed since the Fifth

Circuit handed down *International Primates, supra,* and this Court has been presented with no reason why the Fifth Circuit would now reach a different conclusion upon those same allegations and those same facts.

Accordingly, defendants' motion for summary judgment, seeking to dismiss the above captioned case on the ground that plaintiffs lack standing under Article III of the United States Constitution to maintain this suit, IS GRANTED.

The plaintiffs' contention that the Fifth Circuit decision on the plaintiffs' Article III standing was erroneous under such cases as *Japan Whaling Asso. v. American Cetacean Soc.,* 478 U. S. 221, 106 S. Ct. 2860 (1986), *Animal Welfare Institute v. Kreps,* 561 F. 2d 1002 (D. C. Cir. 1977), and *Alaska Fish & Wildlife Federation v. Dunkle,* 829 F 2d 933 (9th Cir. 1987) is more properly addressed to the Fifth Circuit, not to the district court.

The Court having granted the defendants' motion to dismiss, the plaintiffs' Appeal from the Magistrate's Order of September 4, 1992, and their motion to continue trial are now MOOT.[2]

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[2] In their motion to continue trial of CA #91-2966, the plaintiffs contend that there are several other outstanding motions, namely a motion of Secretary of HHS and Director of NIH to be joined as defendants, an earlier motion of Tulane to dismiss or for summary judgment, plaintiffs' motion to amend the complaint, defendants' motion to join federal officers as defendants, and plaintiffs' motion to remand.

Court records indicate that this Court denied Tulane's earlier motion to dismiss or for summary judgment in October, 1991, and granted the plaintiffs' motion to remand in November

New Orleans, Louisiana, this 30 day of October, 1992.

/s/ Veronica D. Wicker
VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

1991 and no other motion to remand has been filed. The Court notes further that the plaintiff's motion to amend petition and Tulane's motion to join Sullivan were filed in #91-CV-1966 prior to the Court's granting the plaintiffs' motion to remand and have not been reurged since the case was reopened. Also the court records indicate that the motion of the Secretary of HHS to be joined as defendants was filed in the earlier closed proceeding #CA 88-5713 and was not reurged in CA #91-2966. However, even assuming *arguendo* that they were properly before this Court in this proceeding, this Court's dismissal of the plaintiffs' complaint for lack of standing also makes those motions moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3067

INTERNATIONAL PRIMATE PROTECTION LEAGUE, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, and LOUISIANA IN SUPPORT OF ANIMALS,

Plaintiffs-Appellants,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH, and INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 9, 1994, 5 Cir., ___, ___ F.3d ___)

(Filed June 9, 1994)

Before REAVLEY, JOLLY, Circuit Judges, and PARKER, District Judge.*

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*Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Norman M. Reavley
United States Circuit Judge

Judge Duhé did not participate in the consideration of the suggestion for rehearing en banc.